



[Billing Code 4710-25]

DEPARTMENT OF STATE

22 CFR Parts 121, 123, 124, 125, and 129

RIN 1400-AD18

[Public Notice: 8166]

Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XVI.

AGENCY: Department of State.

ACTION: Proposed rule.

SUMMARY: As part of the President's Export Control Reform effort, the Department of State proposes to amend the International Traffic in Arms Regulations (ITAR) to revise Category XVI (nuclear weapons related articles) of the U.S. Munitions List (USML). The revisions contained in this rule are part of the Department of State's retrospective plan under E.O. 13563 completed on August 17, 2011. The Department of State's full plan can be accessed at

<http://www.state.gov/documents/organization/181028.pdf>.

DATES: The Department of State will accept comments on this proposed rule until [insert date 45 days from date of publication in the *Federal Register*].

ADDRESSES:

Interested parties may submit comments within 45 days of the date of publication by one of the following methods:

- E-mail: DDTCResponseTeam@state.gov with the subject line, "ITAR Amendment – Category XVI."
- Internet: At www.regulations.gov, search for this notice by using this rule's RIN (1400-AD18).

Comments received after that date will be considered if feasible, but consideration cannot be assured. Those submitting comments should not include any personally identifying information they do not desire to be made public or information for which a claim of confidentiality is asserted because those comments and/or transmittal e-mails will be made available for public inspection and copying after the close of the comment period via the Directorate of Defense Trade Controls website at *www.pmddtc.state.gov*. Parties who wish to comment anonymously may do so by submitting their comments via *www.regulations.gov*, leaving the fields that would identify the commenter blank and including no identifying information in the comment itself. Comments submitted via *www.regulations.gov* are immediately available for public inspection.

FOR FURTHER INFORMATION CONTACT: Ms. Candace M. J. Goforth, Director, Office of Defense Trade Controls Policy, U.S. Department of State, telephone (202) 663-2792, or e-mail *DDTCResponseTeam@state.gov*. ATTN: Regulatory Change, USML Category XVI.

SUPPLEMENTARY INFORMATION: The Directorate of Defense Trade Controls (DDTC), U.S. Department of State, administers the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120-130). The items subject to the jurisdiction of the ITAR, *i.e.*, “defense articles,” are identified on the ITAR’s U.S. Munitions List (USML) (22 CFR 121.1). With few exceptions, items not subject to the export control jurisdiction of the ITAR are subject to the jurisdiction of the Export Administration Regulations (“EAR,” 15 CFR parts 730-774, which includes the Commerce Control List (CCL) in Supplement No. 1 to part 774), administered by the

Bureau of Industry and Security (BIS), U.S. Department of Commerce. Both the ITAR and the EAR impose license requirements on exports and reexports. Items not subject to the ITAR or to the exclusive licensing jurisdiction of any other agency of the U.S. government, such as the Department of Energy, are subject to the EAR.

Export Control Reform Update

The Departments of State and Commerce described in their respective Advanced Notices of Proposed Rulemaking (ANPRM) in December 2010 the Administration's plan to make the USML and the CCL positive, tiered, and aligned so that eventually they can be combined into a single control list (see "Commerce Control List: Revising Descriptions of Items and Foreign Availability," 75 FR 76664 (December 9, 2010) and "Revisions to the United States Munitions List," 75 FR 76935 (December 10, 2010)). The notices also called for the establishment of jurisdictional "bright lines" between items controlled by the Department of State and items other departments, primarily the Department of Commerce, control. This notice seeks to draw a jurisdictional bright line, but largely with respect to items that are now subject to the jurisdiction of the Department of Energy.

Revision of Category XVI

This proposed rule removes most of the articles enumerated in USML Category XVI (nuclear weapons related articles). The provisions of 22 CFR 120-130 do not apply to all equipment, technical data, or services currently described in Category XVI to the extent that exports of most such equipment, technical data, or services are under the control of the Department of Energy pursuant to the Atomic Energy Act of 1954, as

amended, and the Nuclear Non-Proliferation Act of 1978, as amended, or is a government transfer authorized pursuant to these Acts.

The only articles now covered under Category XVI that would remain subject to USML control are modeling or simulation tools that model or simulate the environments generated by nuclear detonations or the effects of these environments on systems, subsystems, components, structures, or humans, and technical data and defense services directly related to those defense articles. In addition, nuclear radiation detection and measurement devices currently controlled in paragraph (c) would become subject to the jurisdiction of the Department of Commerce under already existing Export Control Classification Number (ECCN) 1A004.c.2 or 2A291.e.

Conforming changes are made to ITAR parts 123, 124, 125, and 129 to remove reference to USML Category XVI. In addition, Supplement No. 1 to Part 126 will be revised to remove the following entries: 1) nuclear weapons strategic delivery systems and all components, parts, accessories, and attachments specifically designed for such systems and associated equipment; 2) defense articles and services specific to design and testing of nuclear weapons; and 3) nuclear radiation measuring devices manufactured to military specifications.

Request for Comments

As the U.S. Government works through the proposed revisions to the USML, some solutions have been adopted that were determined to be the best of available options. With the thought that multiple perspectives would be beneficial to the USML revision process, the public is asked to provide specific examples of nuclear-related items whose jurisdiction would be in doubt based on this revision. In particular, the Department seeks comments

on whether the proposed paragraph (b) is appropriately captured in USML Category XVI or if there is a more suitable control within the USML or CCL.

REGULATORY ANALYSIS AND NOTICES

Administrative Procedure Act

The Department of State is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the United States Government and that rules implementing this function are exempt from sections 553 (rulemaking) and 554 (adjudications) of the Administrative Procedure Act (APA). Although the Department is of the opinion that this rule is exempt from the rulemaking provisions of the APA, the Department is publishing this rule with a 45-day provision for public comment and without prejudice to its determination that controlling the import and export of defense services is a foreign affairs function. As noted above, and also without prejudice to the Department position that this rulemaking is not subject to the APA, the Department previously published a related Advance Notice of Proposed Rulemaking (RIN 1400-AC78) on December 10, 2010 (75 FR 76935), and accepted comments for 60 days.

Regulatory Flexibility Act

Since the Department is of the opinion that this proposed rule is exempt from the provisions of 5 U.S.C. 553, there is no requirement for an analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This proposed rulemaking does not involve a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and it will not

significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rulemaking has been found not to be a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996.

Executive Orders 12372 and 13132

This proposed rulemaking will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this proposed rulemaking does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this proposed rulemaking.

Executive Orders 12866 and 13563

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributed impacts, and equity). These Executive Orders stress the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. These rules have been

designated “significant regulatory actions,” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, this proposed rule has been reviewed by the Office of Management and Budget (OMB).

Executive Order 12988

The Department of State has reviewed the proposed rulemaking in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175

The Department of State has determined that this proposed rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, Executive Order 13175 does not apply to this proposed rulemaking.

Paperwork Reduction Act

Notwithstanding any other provision of law, no person is required to respond to, nor is subject to a penalty for failure to comply with, a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid OMB control number. This proposed rule would affect the following approved collections: 1) Statement of Registration, DS-2032, OMB No. 1405-0002; 2) Application/License for Permanent Export of Unclassified Defense Articles and Related Unclassified Technical Data, DSP-5, OMB No. 1405-0003; 3) Application/License for Temporary Import of Unclassified Defense Articles, DSP-61, OMB No. 1405-0013; 4)

Nontransfer and Use Certificate, DSP-83, OMB No. 1405-0021; 5) Application/License for Permanent/Temporary Export or Temporary Import of Classified Defense Articles and Classified Technical Data, DSP-85, OMB No. 1405-0022; 6) Application/License for Temporary Export of Unclassified Defense Articles, DSP-73, OMB No. 1405-0023; 7) Statement of Political Contributions, Fees, or Commissions in Connection with the Sale of Defense Articles or Services, OMB No. 1405-0025; 8) Authority to Export Defense Articles and Services Sold Under the Foreign Military Sales (FMS) Program, DSP-94, OMB No. 1405-0051; 9) Application for Amendment to License for Export or Import of Classified or Unclassified Defense Articles and Related Technical Data, DSP-6, -62, -74, -119, OMB No. 1405-0092; 10) Request for Approval of Manufacturing License Agreements, Technical Assistance Agreements, and Other Agreements, DSP-5, OMB No. 1405-0093; 11) Maintenance of Records by Registrants, OMB No. 1405-0111; 12) Annual Brokering Report, DS-4142, OMB No. 1405-0141; 13) Brokering Prior Approval (License), DS-4143, OMB No. 1405-0142; 14) Projected Sale of Major Weapons in Support of Section 25(a)(1) of the Arms Export Control Act, DS-4048, OMB No. 1405-0156; 15) Export Declaration of Defense Technical Data or Services, DS-4071, OMB No. 1405-0157; 16) Request for Commodity Jurisdiction Determination, DS-4076, OMB No. 1405-0163; 17) Request to Change End-User, End-Use, and/or Destination of Hardware, DS-6004, OMB No. 1405-0173; 18) Request for Advisory Opinion, DS-6001, OMB No. 1405-0174; 19) Voluntary Disclosure, OMB No. 1405-0179; and 20) Technology Security/Clearance Plans, Screening Records, and Non-Disclosure Agreements Pursuant to 22 CFR 126.18, OMB No. 1405-0195. The

Department of State believes there will be minimal changes to these collections. The Department of State believes the combined effect of all rules to be published moving commodities from the USML to the EAR as part of the Administration's Export Control Reform would decrease the number of license applications by approximately 30,000 annually. The Department of State is looking for comments on the potential reduction in burden.

List of Subjects in Part 121, 123, 124, 125, and 129

Arms and munitions, Exports

Accordingly, for the reasons set forth above, Title 22, Chapter I, Subchapter M, parts 121, 123, 124, 125, and 129 are proposed to be amended as follows:

PART 121 – THE UNITED STATES MUNITIONS LIST

1. The authority citation for part 121 continues to read as follows:

Authority: Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp. p. 79; 22 U.S.C. 2651a; Pub. L. 105–261, 112 Stat. 1920.

2. Section 121.1 is amended by revising U.S. Munitions List Category XVI to read as follows:

§121.1 General. The United States Munitions List.

* * * * *

Category XVI—Nuclear Weapons Related Articles

(a) [Reserved]

(b) Modeling or simulation tools that model or simulate the environments generated by nuclear detonations or the effects of these environments on systems, subsystems, components, structures, or humans.

(c) [Reserved]

(d) [Reserved]

(e) Technical data (*see* §120.10 of this subchapter) and defense services (*see* §120.9 of this subchapter) directly related to the defense articles enumerated in paragraph (b) of this category. (*See* §123.20 of this subchapter for nuclear related controls and §125.4 of this subchapter for exemptions.)

PART 123 – LICENSES FOR THE EXPORT OF DEFENSE ARTICLES

3. The authority citation for part 123 continues to read as follows:

Authority: Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2753; E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp. p. 79; 22 U.S.C. 2651a; 22 U.S.C. 2776; Pub. L. 105–261, 112 Stat. 1920; Sec 1205(a), Pub. L. 107–228.

4. Section 123.20 is amended by revising paragraph (a) to read as follows:

§123.20 Nuclear related controls.

(a) The provisions of this subchapter do not apply to equipment, technical data, or services in Category VI and Category XX of §121.1 of this subchapter to the extent that the export of such equipment, technical data, or services is controlled by the Department of Energy pursuant to the Atomic Energy Act of 1954, as amended, and the Nuclear Non-Proliferation Act of 1978, as amended, or is a government transfer authorized pursuant to these Acts, or is controlled by the Department of Commerce pursuant to the Export Administration Regulations.

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**PART 124—AGREEMENTS, OFF-SHORE PROCUREMENT, AND
OTHER DEFENSE SERVICES**

5. The authority citation for part 124 continues to read as follows:

Authority: Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp., p. 79; 22 U.S.C. 2651a; 22 U.S.C. 2776; Pub. L. 105–261; Pub. L. 111-266.

6. Section 124.2 is amended by revising introductory paragraph (c), removing paragraphs (c)(5)(iii), (c)(5)(ix), and (c)(5)(xi), redesignating paragraphs (c)(5)(iv), (c)(5)(v), (c)(5)(vi), (c)(5)(vii), (c)(5)(viii), (c)(5)(x), (c)(5)(xii), and (c)(5)(xiii) as (c)(5)(iii), (c)(5)(iv), (c)(5)(v), (c)(5)(vi), (c)(5)(vii), (c)(5)(viii), (c)(5)(ix), and (c)(5)(x), respectively, and then revising redesignated paragraphs (c)(5)(iv), (c)(5)(vii), and (c)(5)(x), to read as follows:

§124.2 Exemptions for training and military service.

* * * * *

(c) In addition to the basic maintenance training exemption provided in paragraph (a) of this section and the basic maintenance information exemption in §125.4(b)(5) of this subchapter, no technical assistance agreement is required for maintenance training or the performance of maintenance, including the export of supporting unclassified technical data, to NATO countries, Australia, Japan, and Sweden when the following criteria can be met:

* * * * *

(5) * * *

* * * * *

(iv) Gas turbine engine hot section components covered by USML Category XIX(f)(2);

* * * * *

(vii) Chemical agents listed in USML Category XIV(a), biological agents listed in USML Category XIV(b), and equipment listed in USML Category XIV(f)(1)(i) for dissemination of the chemical and biological agents listed in USML Categories XIV(a) and (b);

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(x) Articles covered by USML Categories XVII and XXI.

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PART 125—LICENSES FOR THE EXPORT OF TECHNICAL DATA AND CLASSIFIED DEFENSE ARTICLES

7. The authority citation for part 125 continues to read as follows:

Authority: Secs. 2 and 38, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778); E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp. p.79; 22 U.S.C. 2651a.

8. Section 125.1 is amended by revising paragraph (e) to read as follows:

* * * * *

§125.1 Exports subject to this part.

(e) The provisions of this subchapter do not apply to technical data related to articles in Category VI(e) and Category XX(b) of §121.1 of this subchapter, to the extent that the export of such data is controlled by the Department of Energy pursuant to the Atomic Energy Act of 1954, as amended, and the Nuclear Non-Proliferation Act of 1978, as amended.

PART 129—REGISTRATION AND LICENSING OF BROKERS

9. The authority citation for part 129 continues to read as follows:

Authority: Sec. 38, Pub. L. 104–164, 110 Stat. 1437, (22 U.S.C. 2778).

10. Section 129.7 is amended by removing and reserving paragraphs (a)(1)(ii) and (a)(1)(iii), as follows:

§129.7 Prior approval (license).

(a) * * *

(1) * * *

(ii) [Reserved]

(iii) [Reserved]

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January 22, 2013
(Date)

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